Marriage as interpreted by church and state in eighteenth-century Scotland

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In our book, *Sexuality and Social Control*, Rosalind Mitchison and I described a form of marriage known as *verba de futuro*, a promise of marriage in the future followed by sexual intercourse, which was accepted by the State but not by the Church. We based this on cases where couples came before kirk sessions, the woman claiming that they were married and the man denying it but admitting promising marriage and then impregnating the woman. The sessions did not consider this to constitute a marriage.[1] Now it would have rendered the institution of marriage very unstable if secular and ecclesiastical courts disagreed on such a fundamental point, so this whole area is ripe for re-examination.[2]

In my earlier work, with Professor Mitchison, the evidence came solely from kirk session and presbytery minutes. But the only court which could pronounce definitively on whether a valid marriage existed was a secular court, the Edinburgh Commissary Court (with the right of appeal to the Court of Session and, after 1707, the House of Lords). Having now researched all Declarator of Marriage actions raised before that court between 1698 and 1830 I am in a position to tackle the question from a different perspective.

Many marriage disputes were first raised before kirk sessions before proceeding on to the civil court. Material from kirk sessions and presbyteries sometimes formed part of the evidence in the Declarator of Marriage action, enabling us to see how the different courts reacted to

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* It is with deep regret that the Society records the death of Dr Leneman in December 1999.

1 Rosalind Mitchison and Leah Leneman, *Sexuality and Social Control – Scotland 1660-1780* (Oxford, 1989), 99. A revised edition of this book has been published as Rosalind Mitchison and Leah Leneman, *Girls in Trouble – Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh, 1998).

2 The legal historian David Sellar disagreed with our contention. W.D.H. Sellar, "Marriage, divorce and the forbidden degrees: Canon law and Scots law", in *Explorations in Law and History – Irish Legal History Society Discourses, 1988-1994*, ed. W.N. Osborough (Dublin, 1995), 59 (footnote).

the same set of circumstances. In fact, as will emerge in the course of this paper, it was not so much a question of differing interpretations as of differences between local ecclesiastical courts run very much on an *ad hoc* basis, and a civil court operating under due processes of law.

However, before turning to the eighteenth century case studies, let us trace the evolution of Scottish marriage law.

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In the twelfth century the canon lawyer Gratian and Pope Gregory IX decreed that free consent of both spouses, not any formal solemnity, was the sole essence of marriage. A valid and binding marriage was therefore created by a simple verbal exchange of vows to this effect between a man and a woman over the age of consent (14 and 12 respectively) expressed in the present tense, and witnessed by two people. In the centuries that followed, canon lawyers and commentators took this simple idea of voluntary, mutual and present consent and created a set of complex rules. Apart from the contract *per verba de praesenti*, mutual and present consent, there was also a contract *per verba de futuro*, a promise for the future. The former was absolutely binding while the latter was revocable unless the promise had been followed by sexual intercourse, as that was taken to imply present consent.[3]

The scope for confusion and dispute was great. For example, the expression "I take you for my wife" was binding, while "I will take you for my wife" was not. And what did the man really say all those months ago in the heat of passion? And should it matter that there were no witnesses if the essence of marriage was simply mutual consent? Litigation was inevitable, and several writers have explored marriage litigation in medieval England.[4] There was no Church and State divide

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[3] Lawrence Stone, *Road to Divorce - England 1530-1987* (Oxford, 1992), 52-3.

[4] The most well-known legal commentator who wrote on the subject was Helmholz, but I draw on work by a recent historian, who summarises the findings of all the legal commentators. Martin Ingram, "Spousals Litigation in the English Ecclesiastical Courts c.1350-1640", in *Marriage and Society – Studies in the Social History of Marriage*, ed. R.B. Outhwaite (London, 1981), 35-57. I know of no similar work for medieval Scotland or even if it is feasible.

at that time since marriage was considered to be the business of ecclesiastical courts – particularly after the Council of Florence (1431-46) when the Roman Catholic Church accepted the view that marriage was a sacrament.[5] Thus, as pointed out by Lawrence Stone, the medieval church was accepting two very different forms of marriage: the mode practised by the elite, which insisted on a public marriage by a priest, in a church, after the banns had been called three times, and the populist mode of private verbal agreements. The acceptance by the Church of the latter has been seen as extraordinary for several reasons: it was impractical to distinguish precisely between the present vow and the future promise; it subverted medieval secular customs whereby marriage in the propertied classes was under the control of parents, with economic and political considerations predominating; and it undermined the Church's efforts to regulate marriage and turn it into a sacrament.[6]

The very fact that the elite married publicly in church meant that couples who did not do this might consider their relationship not to be a binding one. As Martin Ingram has put it about the period between 1350 and 1640 in England: "a proportion of the population remained convinced, or at a pinch were prepared to act as though they believed, that an unsolemnised marriage contract was merely an agreement to perform a marriage, which (like other forms of contract) might in certain circumstances be broken."[7] In many eighteenth-century Scottish cases the woman, while alleging that the man had convinced her their mutual consent was all that was required to make a valid marriage, had nevertheless continued to try and persuade him to have the marriage publicly solemnised.

In Scotland in the 1530s William Hay, the Vice-Principal of King's College, Aberdeen, described three types of marriage. First there was betrothal or handfasting, when a promise was made for the future, often before a priest and with due ceremony. This was a legally enforceable contract though until it was consummated it was not a marriage. It certainly was not some form of "trial marriage" as some later writers

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5 R.B. Outhwaite, *Clandestine Marriage in England 1500-1850* (London & Rio Grande, 1995), 5.

6 Stone, *Road to Divorce – England*, 53-4.

7 Ingram, "Spousals Litigation", 45.

seemed to think. Hay's second type of marriage was one made by present consent without being consummated; the third was by present consent followed by consummation.[8] Lord Fraser, a nineteenth-century Scottish legal commentator, held that prior to the Reformation those modes were merely *sponsalia* or spousals – a precontract – and that only a marriage conducted in a church by a priest was a completed marriage. Parties who entered into *sponsalia* were not supposed to have intercourse; if they did then they were to be punished as fornicators. However, Lord Fraser admitted that such a precontract was nevertheless binding and would have the effect of annulling a subsequent marriage.[9]

At the Council of Trent in 1563 the Roman Catholic church barred all forms of marriage other than that constituted by a public ceremony before a priest and witnesses.[10] The reformers in Scotland had a choice between following this line or adhering to the old forms of marriage. As the change put marriage in the hands of the clergy, the militant lay kirk sessions of Scotland resisted it and chose to retain the other traditional forms of marriage, though it was no longer a sacrament. The confusion, however, persisted, for in the 1560s Aberdeen kirk session complained that couples were living in "manifest fornication and huirdom" six or seven years after being handfasted, having never married in church. There was no suggestion that the kirk sessions should simply have asked them to declare themselves married. The General Assembly of the Church of Scotland eventually decided that there should be no ceremony of betrothal or handfasting, thereby stressing that the proclamation of banns followed by a ceremony in church was true marriage.[11]

According to historians of England, by the late Middle Ages most private marriage contracts were regarded as merely a first step towards solemnisation in church, and by the end of the seventeenth century they

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[8] T.C. Smout, "Scottish Marriage, Regular and Irregular 1500-1940" in *Marriage & Society*, ed. Outhwaite, 210-11. Rosalind Marshall makes the point about handfasting not being some kind of trial marriage in *Virgins and Viragos - A History of Women in Scotland from 1080 to 1980* (London, 1983), 28.

[9] Patrick Fraser, *Treatise on the Law of Scotland as applicable to the Personal and Domestic Relations* (Edinburgh, 1846), i, 128, 131.

[10] Stone, *Road to Divorce*, 55.

[11] Smout, "Scottish Marriage, Regular and Irregular", 212-13.

were almost unheard of. This was, at least in part, due to the English church courts becoming increasingly hostile to so-called contract marriages.[12] In Scotland, the Edinburgh Commissary Court, the national consistory court, was not an arm of the Church but of the State, and if we can assume that decisions from the end of the seventeenth century continued along the lines of previous centuries, then there is no evidence at all of hostility toward this type of marriage.

Further evidence of Anglo-Scottish divergence is that in England common law refused to confer property rights on persons who had not gone through a public ceremony. The man had no enforceable claim on the woman's property, and on his death she and the children had no claim to any of his estate.[13] This was never true in Scotland where the legal consequences of an irregular marriage were exactly the same as for a regular one, and where a subsequent marriage would legitimise a child.

In the seventeenth century the main concern in Scotland was irregular marriages celebrated by dissenters from the established church. An Act of 1661 (consolidating Acts of the 1640s) ruled that the celebrator should be banished and those marrying were to be fined on a scale which ranged from 100 merks for a person of low status to 1,000 pounds Scots for a nobleman.[14] In fact, irregular marriages of any kind were rare until the 1690s, but when the establishment of Presbyterianism forced more than two-thirds of the incumbents of Scottish parishes out of their posts, hundreds of unemployed ministers flocked to Edinburgh, seeking other forms of income. Some of them offered to celebrate marriages without requiring that the banns be proclaimed or asking awkward questions. More legislation was passed against irregular marriage, in 1695 and 1698, raising the financial penalties and including, for the first time, the banishment of ministers celebrating such marriages.[15]

It is worth emphasising that under canon law the fact that the celebrators had been ordained ministers was irrelevant; they were simply acting as witnesses to a couple giving present consent to a

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[12] Ingram, "Spousals Litigation", pp.54-5; Stone, *Road to Divorce*, 54.

[13] Stone, *Road to Divorce*, 56.

[14] *Acts of the Parliaments of Scotland*, v, 348 (1641); viii, 184 (1649); vii, 231 (1661).

[15] *Ibid.*, ix, 387 (1695) and x, 149B (1698).

marriage. (But for people in a culture where marriage was constituted by a ceremony conducted by a minister in church, the use by these ex-ministers of familiar recitations and rituals gave it validity.) So kirk sessions reluctantly had to recognise such marriages as valid, though naturally they rebuked and fined the couples for the irregularity. During the first half of the eighteenth century men who had not been Episcopal ministers began to set themselves up as celebrators of irregular marriages in Edinburgh, and for some decades there was a positive fashion for marrying irregularly: in Leith during the 1730s and 1740s there were more irregular marriages than regular ones. Gradually many Scots realised that a celebrator was not necessary, and in the west of Scotland particularly (where there had never been many irregular marriage celebrators) an increasing number of couples came to kirk sessions and stated that they had mutually agreed to adhere to one another. By the 1770s Glasgow Barony session had such couples sign a declaration (which the session retained) and dated the marriage as commencing from that declaration.[16]

The above were all marriages *de praesenti* and both parties agreed that they were married. The real difficulties lay in cases where the man had convinced the woman that they were consummating a marriage *de futuro* and then, when she became pregnant, denied doing any such thing. The first recourse for the woman was the kirk session, and when the man continued recalcitrant the case might be referred up to the presbytery. As we shall see, some presbyteries did rule on particular marriages, but those decisions had no force in law.

Edinburgh Commissary Court was established in 1563 as Scotland's national consistory court, dealing with all marriage causes. Appeal was allowed to the Court of Session and, after 1707, the House of Lords. The relevant legal action was known as a Declarator of Marriage, and there was also its obverse, a Declarator of Freedom, to repudiate a claimed marriage. Lord Fraser cites some cases from the sixteenth century, but it seems unlikely that there were many prior to the eighteenth century.[17] In 1684 the court began to keep a register of

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[16] Leah Leneman and Rosalind Mitchison, *Sin in the City – Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh, 1998), c.8.

[17] Fraser, *Treatise*, 130-2. He cites his source as MSS Records, Com. Court, vols.i - viii, but no such volumes appear to have survived in the National Archives of Scotland (NAS), formerly the Scottish Record Office, where there

extracted decreets, and process papers were also more systematically kept.[18] The first Declarator of Marriage case after the court began to keep a register of decreets occurred in 1698, but in the 31 years between that date and 1729 there were only 13 cases. However, in the 1730s 15 cases were initiated and in the 1760s there were 43, more than four a year; in the first decade of the nineteenth century there were 76, i.e. between seven and eight a year. Anyone too poor to be able to afford legal costs could apply for benefit of the poor's roll (the equivalent of legal aid), and 9 per cent of litigants did so.

The great rift between English and Scottish marriage law occurred in 1753 with the passage of Hardwicke's Marriage Act which banned all types of irregular marriage in England but not Scotland. As we have seen, there were also major divergences long before that date. But what about the differences between Church and State in Scotland?

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Having established the background, it is time to consider specific cases raised before the Commissary Court. Those chosen all have a link with the Church. In an early case, raised in 1708, both parties – Robert Gray and Marion Gray – were Quakers. Unusually, it was the man who claimed that they were married and the woman who denied this. Robert alleged that "they In the presence of famous witnesses did engadge themselves to one another in the holy Bond of marriage and Joyned hands together, and did subscribe an Declaration and forme of marriage". Furthermore, he produced a decreet issued by Cumbernauld Baron Court, which had inspected that declaration, found them to be lawful spouses and fined them for the irregular marriage. Marion responded that the presbytery and synod of Glasgow had enquired into the matter, and "It was found not to be a marriage But a foolish and sinfull engadgement ffor which they were justly rebuked". And she produced the synod's record. This is a curious case, since neither a baron court nor a synod was competent to pronounce a marriage valid. The Commissary Court demanded that Robert produce the original declaration; after he failed to do so the Court ruled that there was no

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are process papers for only a handful of cases before a volume of decreets was begun in 1684.

[18] Volumes of extracted decreets and boxes of process papers are in the NAS, the former with the prefix CC8/5 and the latter CC8/6.

marriage.[19] No further cases involving baron courts were heard by the Commissary Court before their abolition in 1747.

Indeed, the Commissary Court resented other courts trespassing on its sole jurisdiction. In a Declarator of Freedom case, raised by George McCombe against Janet Gordon in 1746, Janet produced an extract from Wigton presbytery with depositions by witnesses about a marriage between them. George denied the presbytery's jurisdiction and obtained "Letters of Inhibition under the Scroll of this Court, prohibiting and Dischargeing ye presbytery to proceed". The presbytery apparently meant to defy the prohibition, but George hoped the Court would "maintain its own Authority & privileges and give the presbytery to understand that they ought not to usurp a Jurisdiction which does not belong to ym". However, the case was abandoned at that stage, so the legal principle was not tested.[20] In effect the Commissary Court was not just disputing a decision by a presbytery, but the basic right of a presbytery even to cite witnesses in an attempt to establish the facts concerning an alleged marriage.

It was understandable that the Commissary Court should resent meddling, incompetent enquiries by lesser courts, but this position, if strictly held, would have affected the ability of kirk sessions and other courts to hear any business where one of the parties was irregularly married, or might have been held so. However, this extreme position was not taken up in other cases. Kirk sessions and presbyteries continued throughout the century to investigate disputed marriages, and when the couples accepted their findings there was no need to resort to the civil court. And proceedings before presbyteries continued to form part of the evidence in cases before the Commissary Court. However, the Court did not accept such evidence as authoritative.

In 1773 Eupham Burn raised a Declarator of Marriage action against Duncan Macnab in Falkirk, which was uncontested as he had deserted her two years earlier. (Her motive would have been financial, as the Court could force Duncan to support her.) Her lawyer produced a "certificate or attestation under the hands of the Minister, Session Clerk and two of the Elders of Falkirk", in proof of the marriage. As his client was poor and the case was not being contested, he hoped that the Court

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19 NAS, CC8/5/1.

20 NAS, CC8/6/15.

would simply issue a decreet declaring a marriage and finding Duncan liable for aliment. But the Court found this "Irregular and Improper" and flatly refused, demanding that witnesses testify as in any other case. After they did so (and even produced written evidence) the Court found the marriage proven.[21] Before it would admit anyone to the benefit of the poor's roll the Commissary Court would require written evidence of poverty by the parish minister, but when it came to establishing a marriage, any attestation by the Church was only one piece of evidence, of no greater weight than any other.

Evidence brought before the Commissary Court sometimes throws light on attitudes toward the kirk session. Two women in Canonbie, Dumfriesshire – Charlotte Armstrong and Janet Boston – raised rival Declarator of Marriage actions against John Elliot in 1760.[22] Both John and Charlotte belonged to the lower ranks of the landed gentry. He had persuaded her "that the mutual consent of parties and their declaring their accepting of each other for husband and wife made marriage without proclamation of banns or the benediction of a minister, These Circumstances being only political for the sake of publick order", and they "did constitute marriage between them by mutual consent and declaring their acceptance of each other for husband and wife". But after she became pregnant he deserted her and cohabited with Janet. Charlotte had a strong case, for John had given her a written declaration, and though he later got it off her, witnesses had seen and heard it read, as well as witnessing a public "bedding" during which he acknowledged her as his wife. However, he denied a marriage. As part of her evidence Charlotte produced a letter in which he wrote that he had sent the parish minister "two letters which might have satisfied any body yet I have got a most stupid summons from the kirk officer here". He went on:

> you are by no means to go to the session nor you never shall appear before it for whenever that happens I think I may do the business myself But we are not at all ready for such an appearance I wonder you know me so little as to Think I would be giving every impertinent body the satisfaction of

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21 NAS, CC8/5/14.

22 NAS, CC8/5/11. There are a number of rival suits in the records.

declaring a marriage to such as deserved such a Condescencion I have freely made it nor shall I ever at a proper time hesitate to acknowledge Myself yours.

The reluctance of even small gentry to be in any way accountable to kirk sessions has been documented in my books with Professor Mitchison, and this is a prime example.

Evidence heard by the presbytery was laid before the Commissary Court, as was a letter in which Charlotte excused her non-appearance to the session as "in obedience to the man she took to be her husband, who expressly discharged her and not for any disregard to the order of the Church". The presbytery declared them both contumacious but also found it proven "by concurring witnesses that John Elliot had owned Charlotte Armstrong for his wife and bedded with her", though as he was now cohabiting with Janet Boston the presbytery referred the case to synod. Charlotte appeared before the presbytery and apologised for her conduct. She explained that they had agreed to marry and keep it a secret, and that she was with child to him, "but now as he hath most perfidiously deserted me and (as common report is) hath married and cohabited with another I am heartily sorry for my undutifull and disorderly consent to be his wife".

One can see in such a case the necessity for a civil court that could rule authoritatively. The case dragged on for the best part of five years, but eventually the Commissary Court found Charlotte's marriage proven – and simultaneously granted her a divorce on the grounds of his adultery with Janet Boston. It was suggested that John be criminally prosecuted for bigamy.

Another "gentleman" whose attitude toward a kirk session left something to be desired was Lieutenant Charles Shearer. In 1764 Charles had admitted to Falkirk session that he had fathered Elisabeth Grosart's child, and also that of another woman, Isabell Marshall; when Elisabeth raised an action against him in 1768 he insisted that their relationship had been illicit. One witness who appeared for Elisabeth testified that she had told Charles she was very unhappy about the couple living in her house, for she understood that Elisabeth was "his lyby or kept Mistress", and that Charles responded that he was in fact married to her. The witness told him she wished that he "would own that before the Session of Falkirk To which he answered the Session of

Falkirk may go be damned and might kiss his arse, for that she was his wife and he would play with her before their Eyes".[23]

Troqueer kirk session in Dumfries-shire was one that kept a grip on its parish until the end of the century, and in 1792 Martha Hutchison based her action against John Brand on letters he had written her along the following lines:

> you say that the Session will Call you in question who is the father of your Child you have no more to do than this to tell them who your husband is or shew them this Letter which will Confirm your word ... the Session cannot hurt you but for an irregular Marriage which you have no Occasion to satisfy till I come home.[24]

John, who denied being married to Martha, explained the letters as follows. In 1775 Martha had undergone church discipline as an adulteress because she alleged that her pregnancy had been caused by an unknown man who forced her on the road home; women who made such statements were always considered by sessions to be shielding a married man. John Brand admitted to fornication with Martha in 1790, though because of the timing he could not have been the father of her second child. When she found herself pregnant on this occasion she came to him and said she was afraid that the session would be as severe on her as they had been previously and begged for his help. She knew of a girl who "had been saved from doing penance by producing a Letter from some person who had left the Country bearing that the said person was Married to her", and she asked John to write her such letters under an assumed name, swearing that she would never reveal who wrote them. He, out of friendship, did so, but his action did not help her, for the session did not believe the letters to be genuine. But then a lawyer advised her she could claim John as her husband on the basis of the letters, but as they bore a fictitious name (and attempts had been made to deface the signature) she failed to do so.

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[23] NAS, CC8/5/12. The evidence, however, was contradictory, and Elisabeth did not succeed in establishing a marriage.

[24] NAS, CC8/5/21.

A presbytery was unhelpful in the action of Jean Leslie against John Leslie, raised in 1748.[25] Jean alleged a marriage in 1736. John replied that at that time he was a boy of 16, away from home studying, and she was a woman of 27 who "detained Coxed and Cajolled [him] to the neglect of his Studies and Ruin of his Education". He had gone as far as having the banns proclaimed before his mother turned up and brought him "to a sense of the Miserys and Ruin that he was like to have brought upon himself". He then tried to call the whole thing off, but Jean told him he could not do so because "an oath to Marry was equall to Marriage itself". A perplexed John asked the parish minister for his advice, but he refused to give an opinion and told John "to state his Doubts and Difficulties in Writing which he promised to lay before the presbytery and to Report their opinion". The queries were laid before the presbytery:

> *Primo* "Whether the said James Leslie's oath made to Jean Leslie and by her to him before God and Man be Lawfull and Binding" *Secundo* "Is it Dangerous and Damnable for him to procure his ffathers Malediction in Marrying the said Woman".

Their opinion, as reported to John, "was of a very Extraordinary Complexion and Substance as follows 'That as the Parties seemed Inclined to stay in one place it was better they marry than Burn'". John argued from this that there was no marriage at the time. Jean, on the other hand, argued the opposite: that the first query revealed that there had been a promise of marriage, and that he admitted fathering her child, which, in combination, constituted a marriage. However, she subsequently failed to bring any proof, so the Commissary Court cleared him of any marriage to her.

That presbytery produced a bizarre answer; other church courts refused to make a decision. In 1762 Mally Caldwalls applied to have the banns of marriage between Archibald Buchannan of Balfunning and another woman stopped on the grounds that he was already married to her, showing "marriage lines" as proof. Archibald appeared before the session, objected to witnesses being called, and said that the document

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[25] NAS, CC8/5/9.

was forged. The session refused to allow the banns to proceed and recommended to the parties "to pursue the proper Declarators before the Commissaries the Competent Judges in these cases, with all Convenient Speed as they see Cause". Mally did not succeed in proving a marriage.[26]

Likewise, in a male-initiated case, that of David McKie, teacher at Maybole, against Margaret Ferguson, in 1778, David declared before the kirk session that "there were a good many who witnessed their being in bed together holding each other by the hands and declaring themselves married persons", while Margaret admitted being in bed with him but denied a marriage. The session did not feel competent to decide if they should be considered married persons and told them to pursue the matter through the Commissary Court, excluding them from sealing ordinances in the meantime. A marriage was found proven.[27]

In 1781 Margaret Inglis tried to stop Alexander Tod's marriage to another woman in Lasswade on the grounds of a prior marriage to her. The kirk session cited witnesses, including Margaret's mother who when

> asked if ever she saw them in bed together as man and wife, or if ever her daughter had told her that she was married to him answered she never did see them in bed together nor did she ever tell her that she was married to him.

Not surprisingly then the kirk session did not believe that such a prior marriage existed. Nevertheless they decided that it would "imprudent" for Alexander "to Marry with another woman untill it was decided by Some Court according to Law". The Commissary Court agreed that there was no marriage.[28]

A decision on the part of kirk sessions and presbyteries to refer parties in disputed marriages to the civil court was very sensible, but most church courts felt themselves eminently qualified to decide such matters, and a number of cases were raised before the Commissary

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[26] NAS, CC8/5/11.

[27] NAS, CC8/6/38. It appears that Margaret's relatives pressured her into denying it.

[28] NAS, CC8/5/16.

Court after a session or presbytery had already pronounced a couple married – or not.

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This paper began with a specific form of marriage which church courts apparently did not recognise but which the civil court certainly would have. But there were cases where the church courts found a marriage proven, whereas the Commissary Court did not. In 1752 Elizabeth Benstead came from London to South Leith to complain to the kirk session that her husband, James Adams, had deserted her twelve years earlier and was now living with another woman in Edinburgh. James said that she was an imposter and had been brought to Edinburgh by his enemies to ruin his business, and that the certificate was a forgery. The session arranged for someone in London to inspect the register of marriages, and it was found that the registration tallied with the certificate produced. They found the marriage was proven. However, when the action was heard by the Commissary Court, witnesses declared that Elizabeth had been heard to say she had been married to a different James Adams who had died some years earlier, and those witnesses also provided an alibi for James at the time she alleged he cohabited with her, so he was assoilzied.[29] This was not a question of differing definitions, but greater efforts to establish the truth were made before a civil court, since that court's decision was binding and had legal consequences.

Church courts had both strengths and weaknesses. They could decide matters speedily, for they could not be bogged down in legal pettifogging, they had immense local knowledge, they were benign and paternalistic. On the negative side, they had no legal training and followed no due procedure; they did not draw on precedents and were therefore inconsistent.

In 1797 Janet Speedie and her husband, Hugh Lawson raised a Declarator of Freedom action against John Gloag.[30] Gloag had been saying that he had married Janet before she married Hugh. Perth presbytery got involved, and it emerged that while Janet

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[29] NAS, CC8/6/20. The case is mentioned in Leneman and Mitchison, *Sin in the City*, c.8, but of course from kirk session material it appeared that he was the liar, not her.

[30] NAS, CC8/5/23.

> was a very young girl an attempt was made on the part of the said John Gloag and some of his associates to entrap her into a marriage while the parties seemed to have been incapable of consent, the said John Gloag and the whole party being then in a state of inebriety.

John was basing his claim of marriage on nothing but a "drunken and foolish frolic", for no consummation or cohabitation followed; indeed the parties returned to their own homes. He proposed marriage to her after that, but as she would not consent he had himself proclaimed with another woman, while she married Hugh Lawson and had children by him.

> Notwithstanding of all this the Presbytery, mistaking the import of the evidence which never could Establish a marriage by the law of Scotland, have refused to admit them to the privileges of the Church, and besides have very incompetently taken upon them to judge or decide as to the state of the pursuer in society.

John did not contest the case, and the Court declared that she was not his wife.

A contrary decision was made in another case. When Elspeth Currie raised her action against David Turnbull in December 1803 the alleged marriage had taken place two years earlier, and a year after that he had married another woman without any objections from her. David had satisfied church discipline for fornication and had their child baptised as a bastard. Elspeth also agreed to satisfy church discipline for fornication, but "before the day arrived which had been fixed for her appearance she was pleased to tell the Minister that she had got other advice and would not appear before the Session". She had obviously been advised that under Scottish law she could prove that she was actually married. Her case rested on an occasion when they spent two nights together, at which time he wrote a note acknowledging her as his wife, and introduced her as such to the landlady of the lodgings, and others, where they stayed. Because the consummation followed the written declaration, and in spite of his second marriage, the court found

this to be a valid marriage, which legitimised her child and made his second marriage bigamous.[31]

It is not difficult to see why church courts might have been chary of allowing a second marriage to proceed while there was any doubt about a possible prior claim. However, most men who raised an action for Freedom after a church court found them to be married did not succeed in overturning that decision.

In 1773 James Smith had his proclamations for marriage in Glasgow Barony stopped after Janet Syme said that he had previously married her. When they appeared before the session, and witnesses' evidence was heard, the session found them to be married persons. James nevertheless raised an action for Freedom before the Commissary Court. Janet said that he was trying "to get quit of his lawful maried wife presuming probably that from her poverty she would not be able to maintain her defence". The testimony heard by the session was produced as evidence by her, and James was ordered to appear in court for an interrogation. He did not appear, realising, obviously, that he had no hope of prevailing.[32]

In defence of Mary Low's action against him (raised under benefit of the poor's roll) in 1801, James Philip argued that the minutes of Keithhall kirk session's proceedings in 1797 proved that Mary had appeared before them and "was fined alongst with the Father, and Rebuked for the crime of Fornication, which she would not have submitted to, if any marriage or promise of marriage had taken place". And the child was baptised as a bastard. Mary (or rather her lawyer) responded that the Church took cognisance only of a scandal and did not enquire whether the parties had been under a promise of marriage before the intercourse took place – there was nothing "in the Minutes to show that the parties were interrogated as to any promise of Marriage". As to the baptism, her lawyer argued that "as the parties had not been regularly married according to the rules of the Church they could not get the Child baptised as born in lawful wedlock, as the Church knows of no marriages, but those celebrated *in facie ecclesiae*". Now this was nonsense, but the Commissary Court, "In respect that persons may be liable to Church Censure even after a regular Marriage has been

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31 NAS, CC8/5/29/2.

32 NAS, CC8/6/31.

Celebrated on account of a Criminal Connection prior to such celebration" – which was true – found that the proceedings before the kirk session did not disprove the alleged marriage. None of this availed Mary, for James swore in court that he had never promised her marriage, and she was unable to bring any proof, but it shows the civil court operating in a "separate sphere" from the ecclesiastical court.[33]

However, in a final, and particularly interesting, case raised in 1817, the proceedings before the kirk session were of vital importance in establishing a marriage. Mary McKie alleged that she and Thomas Thomson, surgeon in Edinburgh, accepted each other as husband and wife in July 1810 and appeared before the kirk session of Dumfries a year later acknowledging that they had been irregularly married and promising fidelity to one another. Their daughter was baptised as legitimate, but Thomas deserted Mary in November 1811.[34]

Thomas tried to explain away his confession to the kirk session as being under duress: Mary threatened suicide and he, Mary, and the child would have been excommunicated if he had not freed himself from church censure. He was coerced, he said, into signing something about a marriage in the session books but was told that "it could never to him any harm", and their daughter was baptised as a 'natural' child. Her lawyer scoffed at the idea that

> he (innocent and facile minor!) was compelled to sign the Certificate by the Artifices of the Pursuer, a near relation (Mr Armstrong) one of the Members of the Kirk Session, and the Minister and other Members of the Session. This indeed would be a serious charge against those highly respectable individuals if it were supported by a shadow of evidence or probability ... The Defender of his own free will and accord came along with the Pursuer, and appeared before the Kirk Session. He answered the different questions which were distinctly put to him in the affirmative, without expressing any equivocation or a single objection, and signed the Minute of which an Extract is produced.

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[33] NAS, CC8/6/72.
[34] NAS, CC8/6/128.

In the baptismal register the child was recorded as their "lawful daughter".

But the best part of this case is the witnesses' depositions.[35] George Black, the beadle, testified that Thomas told him "that he would willingly marry the woman provided it could be done in such a way as to be kept secret from his Brother Dr Thomson in Edinburgh, on whom he was Depending for his Education, and he wished to keep it as quiet as possible, and he said if he thought it could not be done quietly, he would not do it". Before going in to the session they asked the beadle "how they were to conduct themselves – upon which he told them that when they were to satisfy the Session for a child begot in fornication the woman went in first and accused the man, And if they meant to acknowledge a previous irregular marriage the man went in first and told his story". They did not tell him what they planned to do, but when the session rang a bell to summon them Mary started moving toward the door but Thomas went ahead of her and entered first.

The minister had no specific recollection of what happened but was absolutely certain that he would not have allowed the parties to sign a minute without having read it over to them first. Christopher Armstrong, Janet's relative (a second or third cousin), testified that the parties acknowledged themselves married; he did not speak to either of them and was "certain that no threat or compulsion was used to either of them on that occasion". Another elder testified that the moderator said to Thomas that as he had done Mary "an injury the best thing he could do to atone for it was to marry her", and that both parties agreed to this.

Thomas called his own witnesses, but one of them, Robert Love, who had known him for years, did him no service. He testified that shortly after the child was born Thomas came to him and said that Mary "was pressing him hard to acknowledge a marriage" and that he would go with Mary to the session and acknowledge paternity of the child, "but it was not his intention to marry her, as it was not only against his own interest, but against the inclination of his friends". Sometime after that Thomas told him "that he had declared a marriage before the Kirk

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[35] Litigants who could not afford to bring witnesses to Edinburgh could petition to have them examined locally by someone suitable as a commissioner; the witnesses in this case were examined in Dumfries.

Session". Love asked him why he changed his mind and Thomas told him that Mr Armstrong, one of the elders, had asked him to declare a marriage, and "he thought it was just as well to do so, and voluntarily declared a marriage accordingly". A few weeks later he told Love "that he had not been properly aware of what he was doing when he made the foresaid declaration in the Kirk Session", and that he would not live with Mary. Love was asked by the court if at the first meeting after Thomas had been before the kirk session he "appeared to consider himself as a married man" and testified that he did. Without the proceedings before the kirk session it is doubtful if Mary would have been able to prove a marriage.[36]

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Having looked at a number of cases which came before both ecclesiastical and civil courts we have seen no evidence of any fundamental difference in definitions of marriage. What we have seen, on the other hand, is a great deal of confusion. In our book *Sin in the City* Rosalind Mitchison and I argue that the inexorable rise of irregular marriage in the eighteenth century fatally undermined the authority of the Church, because it became increasingly difficult to discipline parishioners for sexual misdemeanours when they might well be married; on the other hand, they might not be. Some idea of the scale of the phenomenon may be gathered from the fact that in the nineteenth century the Registrar-General estimated that about a third of all marriages in Scotland in the eighteenth century had been irregular.[37]

Looking at the larger picture inevitably overlooks regional differences which, as Professor Mitchison and I demonstrated in *Girls in Trouble*, could be significant. Because comparatively few kirk session records have survived for the Highlands and Islands, that whole area received less attention from us than the Lowlands. The Commissary Court records include cases from Highland Perthshire, Inverness, and Argyll (it is clear that Edinburgh lawyers who spoke Gaelic were always in demand as interpreters), but not from more distant areas. The cost and inconvenience would have deterred inhabitants of Sutherland and the Islands from raising a legal action in

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[36] The case was not concluded until summer 1822.

[37] Smout, "Scottish Marriage, Regular and Irregular", 218.

Edinburgh, and there may well have been different marriage customs in Orkney, Shetland or the Hebrides that are not revealed in these records. The law, however, was the same throughout Scotland.

What should we make of the fact that some kirk sessions treated couples who admitted that they had exchanged promises of marriage before begetting a child as fornicators? Was it really because the Church did not accept marriage *per verba de futuro con copula* as valid? As we have already seen, kirk sessions made many decisions on an *ad hoc* basis. I would argue that the Church most certainly accepted the same definitions of marriage as the State, but individual kirk sessions would make contrary decisions. The existence of a civil court that could decide categorically whether a particular relationship was a valid marriage or not was absolutely crucial. In England before 1753 different courts sometimes came to different decisions: Lawrence Stone cites a 1743 case in which the Court of Common Pleas, a secular court, found a marriage proven while London Consistory Court, an ecclesiastical court, found that there was no valid marriage.[38] This could not have happened in Scotland because Edinburgh Consistory Court was not an ecclesiastical court but a civil court, from which litigants had the right of appeal to higher civil courts. A decision by this court, with its judicial standards of testing evidence, was therefore binding. And though there was a great deal of confusion about what precisely constituted a marriage, this meant that the Commissary Court had the flexibility to decide individual cases on their own merits, while at the same time drawing on, and adding to, case law. Ecclesiastical courts had no real say in deciding which irregular marriages were valid, though their local knowledge might at times provide crucial evidence.

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[38] Lawrence Stone, *Uncertain Unions – Marriage in England 1660-1753* (Oxford, 1992), 173-4.

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